IN THE UNITED STATES ARMY
FIRST JUDICIAL CIRCUIT

U N I T E D S T A T E S	)	
	)	**DEFENSE MOTION TO**
v.	)	**DISMISS THE SPECIFICATION**
	)	**OF CHARGE I FOR FAILURE**
	)	**TO STATE AN OFFENSE**
MANNING, Bradley E., PFC	)	
U.S. Army, (b) (6)	)	
Headquarters and Headquarters Company, U.S.	)	
Army Garrison, Joint Base Myer-Henderson Hall,	)	DATED: 29 March 2012
Fort Myer, VA 22211	)	

RELIEF SOUGHT

1. PFC Bradley E. Manning, by and through counsel, pursuant to applicable case law, Rule for Courts Martial (R.C.M.) 907(b)(1)(B), and the First and the Fifth Amendments to the United States Constitution, requests this Court to either dismiss the Specification of Charge I for failing to state an offense or determine that the term "indirectly," as used in Article 104, is unconstitutionally vague in violation of the First and Fifth Amendments and renders Article 104 substantially overbroad in violation of the First Amendment to the United States Constitution.

BURDEN OF PERSUASION AND BURDEN OF PROOF

2. The Defense, as the moving party, bears the burden of this motion by a preponderance of the evidence pursuant to R.C.M. 905(c)(1) and (2).

FACTS

3. PFC Manning is charged with five specifications of violating a lawful general regulation, one specification of aiding the enemy, one specification of conduct prejudicial to good order and discipline and service discrediting, eight specifications of communicating classified information, five specifications of stealing or knowingly converting government property, and two specifications of knowingly exceeding authorized access to a government computer, in violation of Articles 92, 104, and 134, Uniform Code of Military Justice (UCMJ) 10 U.S.C. §§ 892, 904, 934 (2010). The case has been referred to a general court martial by the convening authority with a special instruction that the case is not a capital referral.

4. In the Specification of Charge I, the Government pleads that PFC Manning "between on or about 1 November 2009 and on or about 27 May 2010, without proper authority knowingly gave intelligence to the enemy, through indirect means." On 14 February, 2012, the Defense pursuant to R.C.M. 906 moved this Court to direct the Government to respond to a bill of particulars in the subject case on the grounds that it was necessary for PFC Manning to understand the charges against him so that he could adequately prepare his defense and not be subject to unfair surprise at trial. The Defense asked in its particulars, "How did PFC Manning knowingly give intelligence to the enemy?" The Government's response was that PFC Manning knowingly gave intelligence to the enemy by "transmitting certain intelligence, specified in a separate classified document, to the enemy through the WikiLeaks website." *See* Government Bill of Particulars. The Government's theory of how PFC Manning knowingly gave information to the enemy fails to allege the requisite intent within the meaning of Article 104 and, as such, the Specification and Charge should be dismissed for failure to state an offense. In the alternative, the Defense argues that Article 104, as applied in this case, violates the Due Process and First Amendment rights of PFC Manning.

WITNESSES/EVIDENCE

5. The Defense does not request any witnesses be produced for this motion. The Defense respectfully requests this court to consider the following evidence in support of the Defense's motion.

a. Chat Logs Excerpt;

b. Charge Sheet;

c. Continuation of DD Form 457.

LEGAL AUTHORITY AND ARGUMENT

A. The Government Fails to State an Offense Because It Has Failed to Allege the Requisite Intent Under Article 104

6. The Government fails to state an offense under Article 104 because it has not alleged the requisite intent. Every court interpreting Article 104(2) has held that the Government must prove general criminal intent to give intelligence to, or communicate with, the enemy; indeed, no prosecution under this Article has ever been maintained without some allegation of *mens rea*. Additionally, if the Government's interpretation of "indirectly" is to be accepted, a staggering amount of conduct would be punishable under Article 104. Accordingly, the Government's interpretation of "indirectly" is untenable because it does not require a showing of the requisite criminal intent.

7. Article 104 punishes "[a]ny person who – (1) aids, or attempts to aid, the enemy with arms, ammunition, supplies, money, or other things; or (2) without proper authority, knowingly harbors or protects or gives intelligence to, or communicates or corresponds with or holds any intercourse with the enemy, either directly or indirectly." 10 U.S.C. § 904. The Government's theory – that PFC Manning indirectly aided the enemy because he knowingly caused to be published on the internet United States intelligence with the knowledge that such intelligence would be accessible to the enemy – does not state an offense because it does not allege that PFC Manning acted with the requisite intent.[1]

8. Courts have uniformly held that the Government must allege and prove a general criminal intent to give intelligence to, or communicate with, the enemy under Article 104(2). *See United States v. Anderson*, 68 M.J. 378, 387 (C.A.A.F. 2010); *United States v. Batchelor*, 22 C.M.R. 144, 157 (C.M.A. 1956) (expressing "no doubt" that Article 104, which "is so closely akin to treason" requires a "showing of criminal intent"); *United States v. Olson*, 20 C.M.R. 461, 464 (A.B.R. 1955). In fact, no prosecution under Article 104(2) has been maintained without an allegation that the accused intended to give intelligence to, or communicate with, the enemy in some way.

9. In *Olson*, for example, the accused was a prisoner of war convicted under Article 104 for aiding the enemy by making speeches and writing publications favorable to his captors and unfavorable to the United States. 20 C.M.R. at 462. In affirming the conviction, the United States Army Board of Review held that Article 104 "does require a general evil intent in order to protect the innocent who may commit some act in aiding the enemy inadvertently, accidentally, or negligently." *Id.* at 464. The court found the accused's conduct to evidence this requisite general "evil intent." *Id.*

10. Similarly, the Court of Military Appeals in *Batchelor* held that a prosecution under Article 104 requires a showing of general intent to aid the enemy. 22 C.M.R. at 157. The accused in *Batchelor* was also a prisoner of war who made several speeches and public broadcasts within his prison camp that criticized and condemned the United States. *Id.* at 150. The accused also directly gave information regarding fellow prisoners of war to his captors. *Id.* at 150-51. In affirming his conviction, the court highlighted the significance of the accused's direct participation with an enemy of the United States by approving of the law officer's instructions on the elements of Article 104:

> He [the law judge] informed the court-martial members that a verdict of guilty could not be returned unless they were satisfied beyond a reasonable doubt that the accused, without proper authority, had

[1] The Government has proceeded under the "gives intelligence to . . . the enemy, either directly or indirectly" clause of Article 104(2). 10 U.S.C. § 904(2). It has not proceeded specifically under the theory that PFC Manning improperly "communicat[ed]" with the enemy. However, if the Government's interpretation of the term "indirectly" is accepted, that interpretation will apply equally to the clause prohibiting communication, thereby sweeping in an enormous amount of constitutionally protected speech.

> *knowingly participated* with the Chinese Communists in planning a subversive organization, had knowingly conducted study groups, made speeches, drafted and circulated "peace" petitions, and expounded Communistic propaganda viewpoints, and *that he knew at the time that the people he was collaborating with were enemies of the United States*. The law officer then characterized these offenses as requiring a general criminal intent and instructed on honest belief as a defense.

Id. at 156 (emphases supplied). The court also approved the law officer's instructions on the term "knowingly:"

> "Specifications 1 and 2 of Charge I allege 'knowingly communicated, corresponded, and held intercourse with the enemy.' You are advised that by 'knowingly,' as used in Specification 1 and Specification 2 of Charge I is meant *that accused knew he was dealing with an enemy of the United States* and that he had full knowledge of all the facts alleged in the specification after the word 'knowingly.'"

Id. at 156-57 (emphasis supplied) (quoting law officer's instructions). The court emphasized that "[w]e have no doubt that [defense] counsel are on sound ground when they assert that [Article 104] requires a showing of criminal intent, and the Government concedes that premise to be true . . . . [S]urely an offense which is so closely akin to treason and may be punished by a death sentence cannot be viewed as a 'public welfare' kind of dereliction." *Id.* at 157. The court concluded that "the law officer's instructions, requiring as they did the finding of general criminal intent and a finding as to words importing criminality, were correct." *Id.* at 158. Therefore, the accused's knowledge that he was dealing with the enemy was central to finding the general criminal intent to aid the enemy, an essential element of an Article 104 prosecution.

11. Along the same lines, the Court of Appeals for the Armed Forces in *Anderson* demonstrated the necessity of a general criminal intent to aid the enemy in an Article 104 charge. The accused in *Anderson* was convicted of attempting to provide sensitive intelligence information to the enemy. 68 M.J. at 380. Specifically, the accused provided emails including "comprehensive information about the number of soldiers in his unit, their training programs, and the precise location to which his unit would be deploying" to a person he believed to be a "Muslim extremist," who in reality was a concerned American citizen attempting to thwart terrorist activities. *Id.* at 381. The accused also met with undercover FBI agents whom he believed to be Al Qaeda operatives and disclosed to them "computer diskettes containing classified information on the vulnerabilities of various military vehicles, the vulnerabilities of his unit as they travelled to Iraq, and other sensitive information." *Id.* The *Anderson* Court highlighted the need for a general criminal intent under Article 104 by contrasting Article 104 with the more general Article 134:

> [W]hile the two charges in this case have parallel facts, as charged they are nonetheless directed at distinct conduct. The Article 104, UCMJ, charge was directed at [Anderson's] attempt to aid the enemy directly. The Article 134, UCMJ, charge was directed towards the distribution of sensitive material to individuals not authorized to receive it-in this case Criminal Investigation Command agents posing as the enemy, but the reasoning could just as easily be applied to the distribution of information to individuals who are not necessarily the enemy, such as a newspaper reporter, or for that matter the private citizen who first encountered [Anderson] on the "Brave Muslim" website. *Unlike Article 104, UCMJ, the general offense as charged prohibits the dissemination of the information regardless of the intent behind that dissemination.* If this distinction was not permissible in light of Article 104, UCMJ, Congress was free to clearly state that Article 104, UCMJ, supersedes Article 134, UCMJ, in this context.

Id. at 387 (emphasis supplied). Thus, *Anderson* makes clear that Article 104(2) requires the Government to allege that the accused intended to directly or indirectly provide intelligence to, or communicate with, the enemy; mere dissemination of information to persons unauthorized to receive it is insufficient without the necessary criminal intent. *See id.*; *Olson*, 20 C.M.R. at 464.

12. Finally, the general criminal intent to aid the enemy was readily apparent in several other Article 104 cases where the court did not specifically address the issue of requisite intent under Article 104. In *United States v. Sombolay*, for example, the accused sold U.S. intelligence information to an undercover U.S. intelligence agent posing as a representative of the Jordanian government. 37 M.J. 647, 648 (A.C.M.R. 1993). The accused had also previously sold intelligence information to representatives of Iraq. *Id.* Similarly, in *United States v. Garwood*, the accused, a prisoner of war in a Vietnamese prison camp, informed against his fellow prisoners and helped the captors lead political indoctrination discussions among the prisoners. 16 M.J. 863, 867 (N-M.C.M.R. 1983), *aff'd*, 20 M.J. 148 (C.M.A. 1985). Likewise, the accused in *United States v. Johnson* admitted to attempting to contact the Viet Cong on two separate instances of unauthorized absence. 43 C.M.R. 160, 161 (C.M.A. 1971). Along the same lines, in *United States v. Dickenson*, the accused, a prisoner of war in a Chinese prison camp in Korea, wrote petitions and made speeches favorable to the Chinese Communists and unfavorable to the United States and also informed against fellow prisoners. 20 C.M.R. 154, 171 (C.M.A. 1955). In each of these cases, the requisite general criminal intent to provide intelligence to, or communicate with, the enemy was evident from each accused's conduct.

13. It is clear that in order to state an offense under Article 104(2), the Government must allege that PFC Manning intended to "give[] intelligence to . . . the enemy" and that PFC Manning did so through indirect means. The intent required is the intent to give the

intelligence to the enemy. For instance, if PFC Manning had printed intelligence information and contacted FedEx to deliver the information to the enemy, he would presumably be guilty of "giv[ing] intelligence . . . to the enemy" indirectly. The term "indirectly" punishes conduct where an accused employs a third party intermediary *for the purpose of* "giv[ing] intelligence to . . . the enemy." The term "indirectly" is not intended to capture the scenario where an accused's disclosure to a third party has the eventual result of intelligence information being accessible to the enemy.

14. Intending to "give[] intelligence to . . . the enemy" and knowing that, if intelligence information is improperly disclosed, it may potentially be accessible to the enemy are two very different things. The former criminalizes an act with a guilty mind – the intent of the accused to "give[] intelligence to . . . the enemy." The latter, on the other hand, criminalizes the inadvertent, accidental, or negligent conduct that Article 104(2) is clearly not intended to reach. *See Olson*, 20 C.M.R. at 464. To hold that negligent conduct in disclosing intelligence information, devoid of an intent to actually "give[] intelligence . . . to the enemy," is actionable under Article 104 is to turn a crime that carries with it the possibility of the death penalty into a strict liability offense. Such an interpretation is not tenable.

15. The interpretation of Article 104(2) as requiring intent to give intelligence to the enemy is further supported by the Military Judges' Benchbook. In the Model Specification to 104(2) ("Giving Intelligence to the Enemy"), the Military Judges' Benchbook provides:

> ***b. MODEL SPECIFICATION:***
> In that _____ (personal jurisdiction data) did, (at/on board—location), on or about _____, without proper authority, *knowingly* give intelligence to the enemy (by informing a patrol of the enemy's forces of the whereabouts of a military patrol of the United States forces) (_____).

Dept. of the Army, Pamphlet 27-9, Legal Services, Military Judges' Benchbook, para. 3-28-4 (1 Jan. 2010) [hereinafter Benchbook] (emphasis supplied). The term "knowingly" means that the accused had to intend to give the intelligence to the enemy, not that the accused knew that, by giving it to a third party, it might eventually end up in the hands of the enemy.

16. Although the Model Specification for "Giving Intelligence to the Enemy" does not contain any specific information about doing so through indirect means, the Model Specification for "Communicating with the Enemy"[2] does:

[2] Giving intelligence to the enemy is a particularized form of communicating with the enemy; thus, the Model Specifications for communicating with the enemy are also broadly applicable to giving intelligence to the enemy.

> ***b. MODEL SPECIFICATION:***
> In that _____ (personal jurisdiction data) did, (at/on board—location), on or about _____, without proper authority, knowingly (communicate with) (correspond with) (hold intercourse with) the enemy (by writing and transmitting secretly through lines to one_____ whom he/she, the accused, knew to be (an officer of the enemy's armed forces) (_____) a communication in words and figures substantially as follows, to wit: (_____) (indirectly by publishing in _____, a newspaper published at _____, a communication in words and figures as follows, to wit: _____, which communication was intended to reach the enemy) (_____).

Id. para. 3-28-5. The Model Specification contemplates specifically the scenario where "a newspaper" is the method by which the accused indirectly communicated with the enemy. Under the Model Specification, the communication via the newspaper intermediary must have been "intended to reach the enemy." *Id.* Where the accused did not intend to reach the enemy – even if the accused knew that the information or communication published by the newspaper could potentially be accessible to the enemy – an offense cannot be stated under Article 104(2).

17. The Government has not properly alleged that PFC Manning indirectly gave intelligence to the enemy under Article 104(2). The Government has not alleged that PFC Manning intended to give intelligence to, or communicate with, the enemy in making the alleged disclosure to WikiLeaks. Rather, the Government has merely alleged that PFC Manning had knowledge that the information, *if* ultimately published, *might* be accessible to the enemy and that such information *might* help the enemy. Such a feeble *mens rea* allegation is patently insufficient to establish the requisite intent under Article 104.

18. Not only has the Government failed to adduce any evidence that PFC Manning intended to give intelligence to the enemy through indirect means, but there is evidence suggesting the opposite – that PFC did not intend to give intelligence to the enemy. In the purported chat logs between PFC Manning and government informant Adrian Lamo, Lamo allegedly asked PFC Manning why he did not sell the information to a foreign government and "get rich off it[.]" In response, PFC Manning expressly disclaimed any intent to help any enemy of the United States:

> [B]ecause it's public data . . . it belongs in the public domain . . . information should be free . . . it belongs in the public domain . . . *because another state would just take advantage of the information . . . try and get some edge* . . . if it's out in the open . . . it should be a public good.

See Attachment A (Chat Logs between PFC Bradley Manning and Adrian Lamo (last visited on 22 March 2012), *available at* http://www.wired.com/threatlevel/2011/07/

manning-lamo-logs/ (emphasis supplied)). Far from intending to aid any enemy of the United States, PFC Manning's actions and statements illustrate a conscious rejection of any such ill motive. Indeed, PFC Manning refused to sell the information to another country, even though he could have financially benefitted by doing so, because he did *not* want an enemy of the United States to "'take advantage of the information[.]'" *Id.* The chat logs show that since PFC Manning did not intend to aid the enemy, he surely did not intend to give intelligence information to the enemy. In this respect, PFC Manning's alleged conduct and statements stand in stark contrast to the conduct of the accused in *Anderson*, who actively attempted to directly give sensitive information to Al Qaeda operatives in an effort to sabotage American operations abroad. *See Anderson*, 68 M.J. at 381.

19. Thus, because the Government has not alleged that PFC Manning acted with the requisite intent to give intelligence to, or communicate with, the enemy, the Government does not state a cognizable Article 104 offense against PFC Manning. Accordingly, this Specification and Charge should be dismissed.

B. The Government's Interpretation of Article 104, as Applied in This Case, Renders Article 104 Unconstitutionally Vague Under the Fifth Amendment to the United States Constitution

20. In the alternative, the Defense submits that an expansive reading of "indirectly," as applied in this case, renders Article 104 unconstitutionally vague in violation of the Due Process Clause of the Fifth Amendment. If Article 104 is interpreted to reach PFC Manning's alleged conduct, it would be constitutionally defective because it would fail to provide sufficient notice of what conduct is prohibited and would fail to provide sufficient guidelines to govern law enforcement.

21. As a general rule, "the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). The proper inquiry in a vagueness challenge to an Article of the UCMJ is whether the challenged Article provides sufficient warning for particular accuseds to reasonably understand that their specific conduct was included within the challenged Article's prohibition. *See Parker v. Levy*, 417 U.S. 733, 756-57 (1974); *United States v. Nat'l Diary Prods. Corp.*, 372 U.S. 29, 32-33 (1963); *United States v. Brown*, 45 M.J. 389, 394 (C.A.A.F. 1996); *United States v. Johanns*, 20 M.J. 155, 158, 161 (C.M.A. 1985); *United States v. Hecker*, 42 M.J. 640, 642-43 (A.F. Ct. Crim. App. 1995) (adding that "[a] penal regulation must be definite and certain, strictly construed, and any doubt with respect to it must be resolved in favor of the accused.") (alterations and quotations omitted). The Supreme Court has pointed out that while both actual notice to the citizenry and arbitrary enforcement are prime concerns of the doctrine, the more important requirement is "'the

requirement that a legislature establish minimal guidelines to govern law enforcement.'" *Kolender*, 461 U.S. at 357-58 (quoting *Smith v. Goguen*, 415 U.S. 566, 574 (1974)).

22. The phrase "indirectly" in Article 104, as interpreted by the Government, is unconstitutionally vague under the Due Process Clause of the Fifth Amendment because it would not provide sufficient notice of the proscribed conduct and would fail to establish any guidelines to govern law enforcement.

23. If the Government's interpretation of Article 104 is accepted, Article 104 would be alarming in scope. Under the Government's interpretation, no criminal intent is required; disclosure of information with the mere knowledge that the information disclosed *might* be accessible to the enemy is punishable under Article 104. The amount of conduct that is made subject to potential capital punishment under such an interpretation is staggering. For example, a top military official discussing what could broadly be classified as intelligence information with a reporter would be potentially liable under Article 104, as the official would likely have known that the information could be accessed by the enemy once the reporter publishes it. Similarly, disclosure of information regarding insufficiency of soldiers' weapons, low morale among soldiers in a particular unit, or the prevalence of Post Traumatic Stress Disorder or suicide among servicemembers would all be subject to Article 104's prohibition of "indirectly" providing intelligence information to, or communicating with, the enemy under the Government's approach. In each instance, the servicemember responsible for the disclosure would be subject to a capital offense notwithstanding the absence of any intent whatsoever to provide intelligence information to, or communicate with, the enemy.

24. PFC Manning could not have reasonably concluded that causing intelligence information to be published on the internet would constitute "indirectly" giving intelligence to, or communicating with, the enemy under Article 104. Similarly, a servicemember speaking with a reporter about high suicide rates in the Army or about the prevalence of Post Traumatic Stress Disorder among servicemembers would certainly not consider this conduct as aiding or communicating with the enemy in any way. To surprise such an individual with criminal liability under Article 104 clearly offends the Due Process Clause of the Fifth Amendment.

25. The potential for liability is endless. What if a soldier sends an email to a family member that contains intelligence information and that family member, in turn, publishes that information publicly (perhaps on a blog or in an editorial piece)? Has the soldier "aided the enemy" because he indirectly communicated intelligence information to the enemy? Does the inquiry turn on whether it was foreseeable that the family member would disclose the information? Does the inquiry turn on how visible the public disclosure is? Further, how many links in the chain of "indirectly" could render the soldier subject to the death penalty? What if the family member forwards the email to a friend who, in turn, publishes it? Is the soldier guilty of aiding the enemy? The point is

that constitutional infirmities abound where "indirectly" is interpreted as the Government suggests.

26. Moreover, interpreting the phrase "indirectly" in such an expansive manner would provide virtually no guidelines to govern law enforcement. Under this definition of "indirectly," any time a person subject to the UCMJ places *any* information on the internet that *might* be accessed by an enemy of the United States, that person will be subject to criminal liability, including the prospect of capital punishment. *See* 10 U.S.C. § 904 (providing for capital punishment, among other punishments). The danger of arbitrary and discriminatory enforcement under such an extension of Article 104 is readily apparent: as a staggering amount of conduct would be punishable under Article 104, law enforcement personnel will, in light of scarce resources, need to be very selective in determining which individuals to prosecute. Such a scenario opens the door for widespread arbitrary and discriminatory enforcement.

27. Therefore, as the Government's interpretation of the term "indirectly" would fail to give sufficient guidelines to law enforcement and would also fail to give reasonable notice of what conduct Article 104 proscribes, this Court should determine that such an interpretation renders Article 104 unconstitutionally vague under the Due Process Clause of the Fifth Amendment.

C. The Government's Interpretation of Article 104 Renders Article 104 Substantially Overbroad in Violation of the First Amendment to the United States Constitution

28. In the alternative, the Defense submits that the Government's expansive interpretation of Article 104 renders it substantially overbroad in violation of the First Amendment. As interpreted by the Government, Article 104 would prohibit a substantial amount of constitutionally protected speech. Furthermore, this substantial overbreadth cannot be cured by assurances of prosecutorial restraint.

29. A law may be struck down on overbreadth grounds where "'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'" *United States v. Stevens*, ___ U.S. ___, 130 S.Ct. 1577, 1587 (2010) (quoting *Washington State Grange v. Washington State Republican Party*, 522 U.S. 442, 449 n.6 (2008)); *see City of Houston v. Hill*, 482 U.S. 451, 466-67 (1987).[3]

[3] As is the case with vagueness challenges, military context matters in an overbreadth inquiry. *See Parker*, 417 U.S. at 758. In *Parker*, the Supreme Court rejected an overbreadth challenge to Articles 133 and 134 of the UCMJ because, "[w]hile there may lurk at the fringes of the articles . . . some possibility that conduct which would be ultimately held to be protected by the First Amendment could be included within their prohibition," the Court determined that "[t]here is a wide range of the conduct of military personnel to which Arts. 133 and 134 may be applied without infringement of the First Amendment." *Id.* at 760-61. No such determination could be made with respect to the Government's interpretation of Article 104 however,

30. Under the Government's interpretation, Article 104 establishes "a criminal prohibition of alarming breadth." *Stevens*, 130 S.Ct. at 1588. Article 104 is substantially overbroad because, if the term "indirectly" is given the interpretation that the Government puts forth, a substantial amount of constitutionally protected speech would fall victim to Article 104's sweeping prohibition. Article 104 categorically prohibits any unauthorized communication with an enemy, regardless of whether the communication contains any intelligence information. As a result, if liability exists for issuing a communication that is not aimed at an enemy but may be indirectly accessed by the enemy, anyone subject to the UCMJ would be unable to make any public statement on any subject without fear of exposure to a capital prosecution. A person subject to the UCMJ could not speak with a newspaper reporter, for example, because the knowledge that the enemy has access to newspapers and might eventually read the reporter's article could transform any communication with the press into a prohibited correspondence with the enemy and a potentially capital crime.

31. Likewise, Article 104, as interpreted by the Government, could conceivably reach any information placed on the internet that might be accessed by the enemy, irrespective of the reason that the information was placed on the public domain in the first place and regardless of whether the information would aid the enemy in any way. So long as the person knows that the information can be potentially accessed by the enemy, the provisions of Article 104 would apply. Such a broad interpretation of Article 104 impermissibly proscribes a substantial amount of constitutionally protected speech. So interpreted, Article 104 would sweep much more broadly and carry much heavier consequences than any previous restriction on soldier speech upheld by the Court. As the impermissible applications of Article 104, as construed by the Government, "far outnumber any permissible ones[,]" it is substantially overbroad in violation of the First Amendment.[4] *Stevens*, 130 S.Ct. at 1592.

32. Moreover, assurances of prosecutorial restraint are insufficient to cure unconstitutional overbreadth. As the Court explained in *Stevens*, "[t]he Government's assurance that it will apply [the statute] far more restrictively than its language provides is pertinent only as an implicit acknowledgement of the potential constitutional problems with a more natural reading." 130 S.Ct. at 1591. Indeed, "[t]he opportunity for abuse,

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as any public statement would subject the speaker to prosecution if the enemy could conceivably access it in some form. Thus, even if there is some conduct to which Article 104 may be constitutionally applied, there is an astonishingly wide range of speech protected by the First Amendment that would subject the speaker to prosecution under the Government's interpretation of Article 104.

[4] Even if the Government's expansive interpretation of Article 104 could somehow be limited so as to reach only information that could potentially aid the enemy without also reaching indirect communications with the enemy (a limitation that finds absolutely no support in the text of Article 104 or in the case law interpreting it), it would still render Article 104 substantially overbroad. Public statements regarding low morale among a particular unit or high rates of PTSD among servicemembers, for example, which might later be accessed by the enemy in some form can be construed as potentially aiding the enemy. Thus, under the Government's interpretation, Article 104's fatal overbreadth cannot be avoided.

especially where a statute has received a virtually open-ended interpretation, is self-evident." *Hill*, 482 U.S. at 466.

33. Therefore, if the Government's interpretation of "indirectly" is correct, this Court should determine that Article 104 is substantially overbroad in violation of the First Amendment.

CONCLUSION

34. Wherefore, in light of the foregoing, the Defense requests this Court either dismiss the Specification of Charge I for failing to state an offense or determine that the term "indirectly," as used in Article 104, is unconstitutionally vague in violation of the First and Fifth Amendments and renders Article 104 substantially overbroad in violation of the First Amendment to the United States Constitution.

Respectfully submitted,

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